IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RONALD G. MORALES and RENEÉ O. MORALES, husband and wife, on their behalf and on behalf of their minor daughters VENESE and ANGELIQUE MORALES; EDWARD A. ENGLISH and ANA M. ENGLISH, on their behalf and on behalf of their minor daughter, EMMA A. ENGLISH; and ARTURO MORALES, Plaintiffs/Appellees, v. ROGER BARNETT, Defendant/Appellant.	2 CA-CV 2007-0118 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200400779

Honorable James L. Conlogue, Judge

AFFIRMED

Mexican American Legal Defense and Educational Fund
By Nina Perales, David Herrera, and Marisa Bono
San Antonio, Texas

and

Richard M. Martinez — Tucson
Attorneys for Plaintiffs/Appellees

David T. Hardy — Tucson
Attorney for Defendant/Appellant

H O W A R D, Presiding Judge.

¶1 Appellant Roger Barnett appeals from the judgment entered after a jury trial in favor of appellees Arturo Morales, Ronald Morales, Angelique Morales, Venese Morales, and Emma English ("the Moraleses"). Barnett claims there was insufficient evidence to support the jury's verdicts on negligent infliction of emotional distress, false imprisonment, and intentional infliction of emotional distress. Barnett also claims the trial court erred when it instructed the jury on negligent infliction of emotional distress because that theory of liability had not been timely disclosed. Barnett further claims the court erred in denying his motion for a new trial on the ground that the court should not have given certain jury instructions. Finally, Barnett claims the jury verdicts were based on improper appeals to passion and prejudice. Finding no error, we affirm the judgment and denial of the motion for new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 13, 961 P.2d 449, 451 (1998). Arturo Morales and his adult son Ronald Morales were hunting deer. They were accompanied by

Ronald's two daughters, nine-year-old Angelique Morales, and eleven-year-old Venese Morales, as well as Venese's friend, eleven-year-old Emma English. Barnett claims the Moraleses were hunting on his private cattle ranch property, a claim the Moraleses dispute.[1] Roger Barnett spotted the Moraleses through binoculars and radioed his brother, Donald Barnett. Donald rode his all-terrain vehicle (ATV) to the Moraleses' location. At that point, Ronald and Venese Morales had gone into the desert, following a deer they had seen from the road. Arturo Morales and the two other girls were still with the truck when Donald arrived. Donald told them that they were trespassing on his brother's property and ordered them to leave. Arturo said he could not leave until his son and granddaughter returned. Donald then left on his ATV and informed Roger Barnett by radio of what had occurred.

¶3 Barnett and his wife drove in their pickup truck to where the Moraleses' truck was located. When they arrived, Barnett told Arturo he had to leave. Arturo told Barnett he had to wait for his son and granddaughter and Barnett then became very angry and threatened to start shooting if they did not leave immediately. Arturo started honking his horn and shortly thereafter, Ronald and Venese returned. Ronald had a rifle with him that he took to his truck. While walking towards the truck, Ronald told Barnett that they had permission to be on the land and asked Barnett for his name. Barnett retrieved a rifle from

[1]Barnett's ranch includes 22,000 acres and is comprised of private property that he owns, private property that he leases, and state trust land that he leases. The dispute appears to be about whether the Moraleses were on private property or state trust land at the time of the incident.

his own truck and pointed it at the Moraleses. He used various expletives, demanded that they leave and threatened to shoot them. Barnett also used derogatory insults in reference to the Moraleses' Hispanic origin. Arturo and Ronald got all three girls into the cab of the truck and departed. Barnett and his wife followed them in their truck. As the Moraleses drove off, they called 911 on a cellular telephone. A sheriff's deputy responded and began questioning. The sheriff's department conducted an investigation but apparently no criminal charges were filed.

¶4 Subsequently, the Moraleses sued Roger Barnett, alleging claims of assault, battery, false imprisonment, negligence, gross negligence, and intentional infliction of emotional distress. The Moraleses further alleged they had "suffered serious injuries, trauma and severe emotional distress." Barnett counterclaimed, alleging, inter alia, a claim of trespass.

¶5 At trial, Barnett moved for judgment as a matter of law pursuant to Rule 50, Ariz. R. Civ. P., as to all claims by the Moraleses. The court denied this motion in part and granted it in part.[2] The jury returned the following general verdicts: (1) in favor of Ronald Morales, with damages of $15,000, apportioning 66.5 percent of the fault to Ronald Morales and 33.5 percent to Roger Barnett; (2) in favor of Arturo Morales, with damages of $15,000,

[2]The court granted judgment as a matter of law against Arturo Morales on the claim of negligent infliction of emotional distress. In addition, the court apparently granted judgment as a matter of law on any claims by the mother of the Morales girls and the parents of Emma English, none of whom was present during the incident.

apportioning seventy-five percent of the fault to Arturo Morales and twenty-five percent to Roger Barnett; (3) in favor of Venese Morales, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett; (4) in favor of Angelique Morales, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett; and (5) in favor of Emma English, with damages of $60,000, apportioning twenty-five percent of the fault to Ronald Morales, twenty-five percent to Arturo Morales, and fifty percent to Roger Barnett. On the counterclaim for trespass, the jury found in favor of Roger Barnett but awarded no damages. Barnett then filed another motion for judgment as a matter of law, or in the alternative, a motion for new trial. After the court entered final judgment on the verdicts and denied Barnett's second motion, Barnett appealed.

Sufficiency of the Evidence to Support Claims

¶6 Barnett argues the trial court erred in denying his motion for judgment as a matter of law based on his contention that insufficient evidence supported the jury's verdicts on false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress. We review de novo the denial of a motion for judgment as a matter of law. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶ 6, 995 P.2d 735, 738 (App. 1999). Such a motion should be granted "'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that

reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.'" *Acuna v. Kroack*, 212 Ariz. 104, ¶ 24, 128 P.3d 221, 227-28 (App. 2006) *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "[W]e 'review the evidence in a light most favorable to upholding the jury verdict' and will affirm 'if any substantial evidence exists permitting reasonable persons to reach such a result.'" *Id., quoting Hutcherson*, 192 Ariz. 51, ¶ 13, 961 P.2d at 451.

A. False Imprisonment

¶7 The elements of false imprisonment are: "(1) the defendant acted with intent to confine another person within boundaries fixed by the defendant; (2) the defendant's act resulted in such confinement, either directly or indirectly; and (3) the other person was conscious of the confinement or was harmed by it." *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 281, 947 P.2d 846, 855 (App. 1997). "The essence of false imprisonment is the direct restraint of personal liberty or freedom of locomotion, either by actual force or the fear of force." *Deadman v. Valley Nat'l Bank of Ariz.*, 154 Ariz. 452, 457, 743 P.2d 961, 966 (App. 1987). "'Any restraint, however slight, upon another's liberty to come and go as one pleases, constitutes an arrest.'" *Boies v. Raynor*, 89 Ariz. 257, 259, 361 P.2d 1, 2 (1961), *quoting Swetnam v. F.W. Woolworth Co.*, 83 Ariz. 189, 192, 318 P.2d 364, 366 (1957). If a reasonable person would conclude that the defendant

> intends to control [the plaintiff's] action, and, if necessary, to use force for that purpose and thereby restrain [the plaintiff] from acting upon her own volition, and if by reason thereof [the

> plaintiff] submits to the control of the other party, then the proof will be sufficient to sustain a charge of false arrest.

Swetnam, 83 Ariz. at 192, 318 P.2d at 366. When one has a reasonable and safe means of egress, there is no confinement. *See* Restatement (Second) of Torts § 36 cmt. a (1965).

¶8 Barnett argues that the evidence shows he was, at all times, insisting the Moraleses leave his property and no evidence exists to indicate that he did anything to restrain or confine them. We note first that Barnett conceded in his testimony that the altercation at issue took place on state land and that, as a general matter, hunters have a legal right to be on state land, unless specifically prohibited by the state. From this and other testimony, substantial evidence suggests that the Moraleses had a legal right to be where they were at the time Barnett confronted them.[3]

¶9 With respect to the altercation itself, the testimony at trial shows Barnett pointed a loaded semi-automatic rifle at the Moraleses and that they believed he was going to shoot them. Barnett testified that while he was pointing the rifle, he instructed Ronald Morales to put his rifle down and Morales complied. Ronald and Arturo testified that Barnett told them that they had to leave and if they did not he would shoot them. Barnett continued to point the gun at them as they were preparing to depart. After the girls got into the cab of the truck, they huddled down on the floor because Ronald and Arturo were afraid Barnett would shoot them. Additional testimony suggests that as the Moraleses were driving

[3]The testimony also suggests that the Moraleses did trespass on Barnett's private land earlier that day.

away, Barnett lifted his rifle, as if to take aim, and that the Moraleses believed he was going to try to shoot them while they were driving. Finally, the evidence shows that Barnett followed the Moraleses for some distance while they were driving.

¶10 The foregoing constitutes substantial evidence from which a reasonable person could conclude that Barnett had intended to force the Moraleses, at gunpoint, to submit to his control and that the Moraleses had been confined in that they had no choice but to do as Barnett commanded. Barnett intended to invade the liberty interest that the tort of false imprisonment is designed to protect. *See Deadman*, 154 Ariz. at 457, 743 P.2d at 966. Thus, there is sufficient evidence to support a finding of liability for false imprisonment. *See Swetnam*, 83 Ariz. at 192, 318 P.2d at 366.

¶11 Barnett cites two provisions of the Restatement (Second) of Torts § 36 (1965) in support of his assertion that he did not commit false imprisonment. The first is that "[t]o make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete." Restatement § 36(1). But later sections of the Restatement make clear that confinement does not require "actual or apparent physical barriers." Restatement § 38. Confinement may be accomplished solely by the use of physical force or the threat of physical force. Restatement §§ 39, 40. As Professor Dan B. Dobbs observes, "the boundaries of the plaintiff's confinement may be much less precise than four walls. The plaintiff who is detained on the street by a gang may be confined even if the gang does not specify the exact limits of her free movement." 1 Dan B. Dobbs, *The*

Law of Torts § 36, at 68 (2001). In this case, Barnett was using the threat of deadly force to restrain the Moraleses from doing anything other than what he instructed. And their confinement was complete in that the Moraleses had no reasonable and safe means of egress. Being directed at gunpoint, by someone with no legal justification, is manifestly neither safe nor reasonable.

¶12 Barnett also cites the provision in Restatement § 36 that says, "[t]he actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go." Restatement § 36(3). But in this case, Barnett was not merely blocking the Moraleses from going in a particular direction. This is not a scenario in which the plaintiffs were free to do as they wished so long as they did not travel down one particular road that was being guarded by the defendant. *See* Dobbs, *supra*, at 68 (obstructing road not confinement). Rather, the Moraleses were not allowed to exercise any choice about their movements. Barnett was actively forcing the Moraleses to do only as he directed.

¶13 Viewed in the light most favorable to upholding the verdict, *see Acuna*, 212 Ariz. 104, ¶ 24, 128 P.3d at 228, the evidence is sufficient to find that Barnett falsely imprisoned the Moraleses. Barnett does not dispute the other elements of the tort and we therefore do not address them.

B. Intentional Infliction of Emotional Distress

¶14 Barnett claims the Moraleses did not produce sufficient evidence establishing the elements of intentional infliction of emotional distress. That tort requires proof of three elements: "'[F]irst, the conduct by the defendant must be "extreme" and "outrageous"; second, the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and third, severe emotional distress must indeed occur as a result of defendant's conduct.'" *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, ¶ 11, 115 P.3d 107, 110 (2005), *quoting Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987) (emphasis omitted; brackets in *Citizen Publ'g Co.*).

¶15 Barnett first argues the evidence is insufficient to show he had intended to inflict emotional distress or that he acted with reckless disregard of a near certainty that such harm would occur. The Moraleses contend that Barnett has waived this argument because he did not challenge the sufficiency of the evidence on the element of intent when he made his pre-verdict motion for judgment as a matter of law or when he renewed that motion post-verdict. Generally, an appellant may not raise arguments on appeal that were not presented below. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004). Raising an issue below as to one element of a claim does not preserve arguments on the other elements for appeal. *See Acuna*, 212 Ariz. 104, ¶¶ 26-27, 128 P.3d at 228. In this case, when Barnett moved for judgment as a matter of law during trial, he listed the elements of intentional infliction of emotional distress and generally asserted there

was insufficient evidence to support such a claim. But he only challenged with specificity whether there was sufficient evidence of severe emotional distress.[4] This did not preserve an issue for appeal regarding the intent element. Likewise, in his post-verdict motion for judgment as a matter of law, Barnett merely listed the elements of intentional infliction of emotional distress and then focused his argument on whether the element of severe emotional distress had been shown. Barnett has thus waived any claim on appeal that the evidence did not show he possessed the requisite intent.

¶16 Barnett next argues there was insufficient evidence to support the element of severe emotional distress. To support a claim of intentional infliction of emotional distress, the plaintiff's emotional response to the defendant's conduct must be severe but it need not rise to the level of a "disabling response." *Pankratz v. Willis*, 155 Ariz. 8, 17, 744 P.2d 1182, 1191 (App. 1987).[5]

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[4]Barnett also argued, during his Rule 50 motion, that the evidence was insufficient to show his conduct was extreme and outrageous, but he did not raise that issue in his post-verdict motion, nor does he raise it on appeal.

[5]Barnett suggests the case law in Arizona on the element of severe emotional distress is in "disarray." But the cases are actually quite consistent, holding that the emotional distress must be severe but that a physical injury is not necessary. *See Duke v. Cochise County*, 189 Ariz. 35, 38, 938 P.2d 84, 87 (App. 1996) (physical injury not required); *see also Ford*, 153 Ariz. at 43, 734 P.2d at 585 (severe emotional distress must occur). Barnett cites *Venerias v. Johnson*, 127 Ariz. 496, 500, 622 P.2d 55, 59 (App. 1980), for the proposition that "a severely disabling emotional response" is required. But as the Moraleses correctly point out, in *Pankratz* this court specifically overruled that portion of *Venerias*. *See Pankratz*, 155 Ariz. at 17, 744 P.2d at 1191 (with respect to requirement that plaintiff suffer disabling response, court stated "we reject that single aspect of *Venerias*").

¶17 In this case, the trial court found sufficient evidence to instruct the jury on intentional infliction of emotional distress as to all three girls, as well as to Arturo and Ronald Morales. Barnett's argument on this issue focuses on the three girls. To the extent he suggests the evidence was insufficient as to all five appellees, any argument regarding Arturo and Ronald Morales is not adequately developed. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) ("Issues not clearly raised and argued in a party's appellate brief are waived."); *see also* Ariz. R. Civ. App. P. 13(a)(6). We therefore address only the sufficiency of the evidence to support this claim as to the three girls.

¶18 At the time of the incident, all three girls believed they were going to die. All three girls were subsequently diagnosed with chronic post-traumatic stress disorder. Evidence was presented at trial regarding numerous manifestations of the severity of the girls' distress, including the following: Angelique testified about an occasion in a restaurant during which she had thought she had seen Donald Barnett and it caused her to vomit; Venese testified that she believed Roger Barnett would come looking for her at her school and her mother testified that Venese had once become terrified inside a store when she had bumped into a man she thought was Roger Barnett; Emma's parents testified that Emma had suffered stomach aches and recurring nightmares, was afraid of the dark, and would become nervous whenever someone knocked at the door. Emma herself testified that she continues to fear that Barnett might kill her or her parents. We conclude that substantial evidence was

presented that would permit a reasonable person to conclude the three girls suffered severe emotional distress.

C. Negligent Infliction of Emotional Distress

¶19 Barnett also argues the evidence did not establish the degree of physical injury required for the tort of negligent infliction of emotional distress. Although the law in Arizona requires a showing of bodily harm, a "long-term physical illness or mental disturbance" is sufficient to meet this requirement.[6] *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, ¶¶ 7-8, 995 P.2d 735, 738-39 (App. 1999). As we have already observed, all three girls were diagnosed with chronic post-traumatic stress disorder by a psychologist who testified at trial. We conclude that substantial evidence exists that would permit a reasonable person to find that emotional distress resulting in a long-term mental disturbance has occurred.

¶20 Barnett points out that he presented the testimony of another psychologist who disputed theses diagnoses. But this shows only that there was a question of fact to be decided. That question was for the jury to resolve. *See Ball v. Prentice*, 162 Ariz. 150,

[6]Barnett suggests error occurred because the jury was not instructed that "physical injury or illness" can include "substantial, long-term emotional disturbances." But at trial, Barnett did not request this instruction, nor did he specifically object to the omission of this explanation from the instruction that was given. Barnett has thus waived this argument on appeal. *See* Ariz. R. Civ. P. 51(a) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *see also S Dev. Co. v. Pima Capital Mgmt. Co.*, 201 Ariz. 10, ¶ 20, 31 P.3d 123, 132 (App. 2001).

152, 781 P.2d 628, 630 (App. 1989) ("The nature, severity and extent of [plaintiffs'] injuries and whether they are supported by medical or other expert witnesses is a question for the trier of fact.").

Disclosure of Claim and Amendment of Pleadings

¶21 Barnett also argues the trial court erred in overruling his objection to the jury instruction on negligent infliction of emotional distress.[7] Barnett contends the pleadings did not contain that specific cause of action and the Moraleses had not otherwise disclosed negligent infliction of emotional distress as a theory of liability. But, as provided in Rule 15(b), Ariz. R. Civ. P.:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, *but failure so to amend does not affect the result of the trial of these issues*.

(Emphasis added.) We review a court's decision to allow an amendment of the pleadings for an abuse of discretion. *See Cont'l Nat'l Bank v. Evans*, 107 Ariz. 378, 381, 489 P.2d 15, 18 (1971).

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[7]Barnett appears to argue that the trial court erred by denying his motion for judgment as a matter of law based on his claim that it was error to instruct the jury on negligent infliction of emotional distress. We have determined that sufficient evidence supported the verdict, so we will not discuss the instruction issue in connection with the separate Rule 50, Ariz. R. Civ. P., issue, which we have already discussed.

¶22 Whether an issue not contained in the pleadings was tried by implied consent is determined by review of the record. *See Collison v. Int'l Ins. Co.*, 58 Ariz. 156, 162, 118 P.2d 445, 447 (1941). Consent of the parties is generally implied when there is no objection to the introduction of evidence that gives rise to the new or different theory. *Elec. Adver., Inc. v. Sakato*, 94 Ariz. 68, 71, 381 P.2d 755, 756-57 (1963). The pleadings shall be amended to conform to the proof when an objecting party shows no more than "legal surprise" as opposed to "actual surprise." *Cont'l Nat'l Bank*, 107 Ariz. at 381, 489 P.2d at 18. When the pleadings should have been amended to conform to the evidence presented at trial, we will treat such amendments as made. *Beckwith v. Clevenger Realty Co.*, 89 Ariz. 238, 241, 360 P.2d 596, 597 (1961). "'Failure to formally amend the pleadings will not affect a judgment based upon competent evidence.'" *Barker v. James*, 15 Ariz. App. 83, 86, 486 P.2d 195, 198 (1971), *quoting Elec. Adver.*, 94 Ariz. at 71, 381 P.2d at 756-57.

¶23 A trial court has a duty to instruct the jury on all legal theories that are "framed by the pleadings and supported by substantial evidence." *AMERCO v. Shoen*, 184 Ariz. 150, 156, 907 P.2d 536, 542 (App. 1995). When a party challenges a trial court's instruction on appeal, reversal is only justified if the instruction is erroneous and prejudices the substantial rights of the appealing party. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504, 917 P.2d 222, 233 (1996). Prejudice "'will not be presumed'"; rather it "'must affirmatively appear from the record.'" *Id., quoting Walters v. First Fed. Sav. & Loan Ass'n*, 131 Ariz. 321, 326, 641 P.2d 235, 240 (1982); *see also Gutierrez v. Gutierrez*, 20

Ariz. App. 388, 389, 513 P.2d 677, 678 (1973) (burden to establish prejudice is on appellant).

¶24 The Moraleses concede that they did not include the term negligent infliction of emotional distress in their complaint, and a review of the record shows it was not otherwise disclosed during litigation until the Moraleses submitted their proposed jury instructions. On the fourth day of the five-day trial, the court observed, during a bench conference, that negligent infliction of emotional distress was the only negligence theory supported by the evidence, and then only as to the three girls. Barnett argued both that there was insufficient notice of this claim and that the evidence did not support such a theory of liability. The court rejected these arguments, finding that the pleadings sufficiently framed the issue, because they alleged both negligence and emotional distress. The court further concluded that the evidence presented at trial warranted the instruction.

¶25 We first note that Barnett does not explain what he would have done differently had the pleadings included the actual term "negligent infliction of emotional distress." Barnett merely contends that the elements of this cause of action are different than the elements of other negligence claims. Specifically, Barnett points out that the negligence theory requires a showing of severe emotional distress that manifests itself in physical injury or illness, which we have already noted may include a mental disorder. Barnett implicitly suggests that, because the theory of negligent infliction of emotional distress was raised near the end of the Moraleses' case, and after both psychologists had testified and been

dismissed, he might have conducted examination and cross-examination differently had the issue been raised before. But he does not identify any other evidence he would have elicited or other questions he would have asked, nor did he request a continuance to obtain additional evidence. Barnett was motivated to dispute the Moraleses' evidence in order to defeat the other alleged torts or to mitigate the damage award. And the record shows Barnett spent a meaningful amount of time challenging the Moraleses' claim of emotional distress and the finding of any resulting mental disorders. Barnett cross-examined the Moraleses' psychological expert and brought in his own expert psychologist to rebut the testimony of the Moraleses' expert.

¶26 Although including the theory of negligent infliction of emotional distress in the instructions may have constituted legal surprise, it did not constitute actual surprise. *See Cont'l Nat'l Bank*, 107 Ariz. at 381, 489 P.2d at 18. We cannot discern from the record, nor from Barnett's argument on appeal, how he would have conducted his defense differently had the pleadings, or other disclosures, been more specific with respect to the negligence claims.

¶27 Barnett further argues that requesting an instruction on negligent infliction of emotional distress on the fourth day of trial constituted a disclosure violation prohibited by Rule 26.1, Ariz. R. Civ. P. He asserts that the failure to disclose this legal theory warranted sanctions pursuant to Rule 37(c), Ariz. R. Civ. P., and that allowing the jury instruction was presumptively prejudicial. We review a court's decision not to impose sanctions for

violations of Rule 26.1 for an abuse of discretion. *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, n.2, 149 P.3d 761, 763 n.2 (App. 2006).

¶28 Preliminarily, the Moraleses implicitly argue they did not violate the disclosure rules because their complaint and disclosures included a negligence theory. But a party is required to disclose "[t]he legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Ariz. R. Civ. P. 26.1(a)(2). A common negligence claim is a completely different tort from negligent infliction of emotional distress. Accordingly, the Moraleses violated their disclosure obligations.

¶29 Nevertheless, we will only overturn the verdict if the disclosure violation was prejudicial. *See Zimmerman v. Shakman*, 204 Ariz. 231, ¶¶ 10, 14, 62 P.3d 976, 980-81 (App. 2003). Such prejudice "must affirmatively appear from the record." *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993). The comments to the 1996 and 1997 amendments to Rule 37(c), which Barnett cites in support of his contention that prejudice is presumed, focus on the untimely disclosure and use of *evidence*. We also note that the committee comment to the 1991 amendment to Rule 26.1(b) stated it was not intended "to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15." Here, the Moraleses were not seeking to admit undisclosed evidence. They were seeking, if only by inference through the proposed jury instructions, to amend the pleadings to reflect the issues actually litigated at

trial. And the fact that no formal amendment occurred will not be used to disturb an otherwise sound judgment. *See Thomas*, 163 Ariz. at 164, 786 P.2d at 1015.

¶30 In his reply brief, Barnett cites this court's decision in *Englert v. Carondelet Health Network*, 199 Ariz. 21, 13 P.3d 763 (App. 2000), in support of his argument that the disclosure violation warranted preclusion of the instruction. *Englert* involved a medical malpractice action in which the defendant physician had raised an affirmative defense theory for the first time in his closing argument. *Id.* ¶ 4. The trial court granted the plaintiff a new trial after it found it had erred in failing to sustain her objection to the introduction of an undisclosed theory of defense. *Id.* The physician's affirmative defense was predicated on evidence submitted at trial and to which the plaintiff had not objected. *Id.* ¶ 8. The plaintiff argued on appeal that she had not objected to it because she believed the defendant had introduced that evidence to prove a nonparty physician's fault. *Id.* This court concluded that the defendant's failure to comply with the disclosure rules gave rise to the plaintiff's misunderstanding. *Id.* We held the trial court did not abuse its discretion in ordering a new trial, noting that the issue was "not whether the evidence was admissible, but whether [the defendant] should have been allowed to argue that it supported an undisclosed theory of comparative fault." *Id.*

¶31 Here, Barnett's argument is essentially the same as the plaintiff's in *Englert*, that is, Barnett claims to have believed the evidence regarding emotional distress was all being introduced to support the claim of intentional infliction of emotional distress and that

the Moraleses' failure to comply with the disclosure rules is what created this misunderstanding. But in *Englert*, our task was to determine if the court had erred in granting a new trial under an abuse of discretion standard. *Id.* ¶ 5. The trial court had concluded that the error had materially affected Englert's rights. *Id.* ¶ 4. Here, the trial court found, at least implicitly, that introducing the new theory did not prejudice Barnett, and we again review that decision for an abuse of discretion and prejudice. Because no prejudice affirmatively appears from the record, we must uphold the trial court's conclusion. *See Callender*, 179 Ariz. at 562, 880 P.2d at 1108.

¶32 Finally, Barnett argues the instruction on negligent infliction of emotional distress was clearly of central importance in the jury's deliberations and that, but for the giving of this instruction, he would have prevailed. Assuming Barnett is correct, this only suggests the trial court might have committed error if it had *refused* to give the instruction on negligent infliction of emotional distress, not that Barnett has suffered some kind of prejudice. *See AMERCO*, 184 Ariz. at 156, 907 P.2d at 542 (trial court must instruct on all legal theories framed by the pleadings and supported by the evidence). Finding a defendant liable for tortious conduct that he actually committed is not prejudicial. Rather, such an outcome is the very essence of justice. The policy favoring liberal amendment of the pleadings is intended to prevent "the injustice of pleading technicalities," *Walton v. Hager*, 13 Ariz. App. 520, 521-22, 478 P.2d 135, 136-37 (1970), and to sustain judgments that are

based on competent evidence, *see Thomas*, 163 Ariz. at 164, 786 P.2d at 1015. The trial court did not err by instructing the jury on negligent infliction of emotional distress.

New Trial because of Error in Instructions

¶33 Barnett claims the trial court erred in denying his motion for a new trial. "'We review the denial of a motion for new trial . . . for an abuse of discretion.'" *White v. Greater Ariz. Bicycling Ass'n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007), *quoting Mullin v. Brown*, 210 Ariz. 545, ¶ 2, 115 P.3d 139, 141 (App. 2005) (alteration in *White*). On appeal, Barnett claims the jury should not have been instructed on false imprisonment, intentional infliction of emotional distress, or negligent infliction of emotional distress. But in his motion for new trial, the only error in jury instructions that Barnett alleged was the instruction on negligent infliction of emotional distress on the grounds that it had not previously been disclosed. Because we have already concluded that the court did not err in allowing this claim to go to the jury, it likewise did not abuse its discretion in denying a new trial on this ground.

¶34 Barnett also included various other grounds to support his motion for new trial, including insufficiency of the evidence to support the intentional torts. To the extent Barnett is arguing on appeal that it was error to instruct on false imprisonment and intentional infliction of emotional distress because of insufficient evidence, we have already concluded sufficient evidence exists to support those claims and therefore the court did not abuse its discretion in denying Barnett's motion for a new trial on these grounds.

New Trial Because of Passion and Prejudice

¶35 Barnett finally asserts the trial court erred in denying his motion for a new trial because the jury verdicts were the result of passion and prejudice. He contends that the damages assessed by the jury, before it apportioned fault, were excessive. Barnett argues that "passion and prejudice" was incited by the presentation of evidence of other lawsuits against Barnett, allegations of assaults and threats by Barnett involving the use of dogs and weapons, a suggestion that Barnett is a member of a white supremacist group, and a suggestion that Barnett has boasted about how many "Mexicans" he has captured for deportation. We first note that Barnett fails to cite any pertinent legal authority in support of this claim. We therefore reject it. *See* Ariz. R. Civ. App. P. 13(a)(6); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998).

¶36 Moreover, we would find no error in the court's denial of a new trial on the ground that the verdict was influenced by passion or prejudice. "The appropriate test of passion or prejudice is whether the verdict is 'so manifestly unfair, unreasonable and outrageous as to shock the conscience of the court.'" *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 501, 733 P.2d 1073, 1084 (1987), *quoting Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971). Here, the total damages amounted to $210,000, split among five plaintiffs. After apportioning a majority of the fault to Arturo and Ronald Morales, the actual recovery amounted to $98,775. Barnett accosted the Moraleses at gunpoint and caused them to fear for their lives. No punitive damages were awarded. Barnett concedes

that he failed to object to some of the evidence of which he now complains but argues a new trial was proper, "based upon cumulative misconduct." He provides no authority or legal analysis to support this assertion. Barnett has failed to present anything that even remotely approaches the standard set forth in *Hawkins*. The trial court therefore did not abuse its discretion in denying his motion for a new trial on these grounds. *See White*, 216 Ariz. 133, ¶ 6, 163 P.3d at 1085.

Conclusion

¶37 Based on the foregoing, we affirm the court's denial of Barnett's motion for a new trial as well as the final judgment entered pursuant to the jury verdicts.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge